*AT&T Mobility LLC v. Vincent Concepcion et ux.**

I. INTRODUCTION

In the spring of 2011, the United States Supreme Court struck down the use of a state judicial doctrine that limited the enforceability of arbitration agreements. The decision is a boon to corporations and merchants but will have a detrimental effect on consumers. On April 11, 2011, the Court ruled that the Federal Arbitration Act (FAA) preempts a California judicial doctrine that allows courts to hold class action arbitration waivers in consumer agreements unconscionable.[1] The challenged California doctrine, known as the *Discover Bank* rule, effectively required the availability of class proceedings when (1) the contract is a consumer contract of adhesion, (2) disputes "predictably involv[e] small amounts of damages," and (3) that "it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money."[2] The California courts have extended the rule, which originally only applied to class-action waivers in litigation, to apply to arbitration agreements in which a consumer's ability to take part in a class-action arbitration is waived. The Court held that because the *Discover Bank* rule is inconsistent with the two goals of the FAA—enforcement of private contracts and facilitation of streamlined dispute resolution procedures[3]—the FAA preempted the California rule, eliminating a strong mechanism for consumer protection in the process.

II. FACTS AND PROCEDURAL HISTORY

A. *Facts*

Vincent and Liza Concepcion ("Concepcion") entered into a cell phone service contract with Cingular Wireless ("Cingular") in February 2002.[4] The contract included an arbitration clause that required all claims be brought in the party's "individual capacity, and not as a plaintiff or *class member* in any

---

*AT&T Mobility LLC v. Vincent Concepcion et ux., 131 S. Ct. 1740 (2011).

[1] *Id.* at 1753.

[2] *Id.* at 1746.

[3] *Id.* at 1749 (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

[4] *Id.* at 1744.

purported class or representative proceeding."[5] The agreement also allowed the service provider to make unilateral amendments at will.[6] AT&T Mobility LLC ("AT&T") acquired Cingular in 2005 and assumed all of its consumer contracts.[7]

The Concepcions signed the contract with AT&T after seeing an advertisement promising free phones.[8] Despite not being charged for the actual phones, they were still required to pay $30.22 in sales tax per phone.[9] Claiming that their cell phone provider defrauded them, the Concepcions filed suit.[10]

B. *Procedural History*

Plaintiffs' original complaint was filed in the United States District Court for the Southern District of California.[11] That suit was consolidated with a putative class action suit against AT&T based on claims of false advertising and fraud.[12]

AT&T moved to compel arbitration based on the contractual language. The Concepcions opposed the motion and claimed the arbitration clause was unconscionable under California law because it disallowed classwide

---

[5] *Id.* (emphasis added). Thereafter AT&T made changes to the arbitration agreement which, although not at issue in this case, would later factor into the Court's decision to honor the contract. The terms include: (1) a mandate that AT&T must pay all costs for nonfrivolous claims; (2) denies AT&T the ability to seek reimbursement of attorneys' fees; and (3) a conditional $7,500 minimum payment from AT&T to the customer if the arbitration award is higher than AT&T's last settlement offer. *Id.*

[6] *Id.*

[7] *Id.* at n.1. AT&T is presently litigating its right to acquire T-Mobile. *See* Complaint, United States v. AT&T Inc., No. 1:11-cv-01560 (D.D.C. Aug. 31, 2011). If this transaction goes through, all current T-Mobile customers may be subject to the same arbitration provisions that are at issue in this case. Some AT&T customers have already attempted, and failed, at blocking the merger in federal court. *See, e.g.*, AT&T Mobility LLC v. Gonnello, No. 11 Civ. 5636, 2011 U.S. Dist. LEXIS 116420 (S.D.N.Y. Oct. 7, 2011).

[8] *Concepcion*, 131 S. Ct. at 1744.

[9] *Id.*

[10] *Id.*

[11] *See* Laster v. T-Mobile USA, Inc., 2008 U.S. Dist. LEXIS 103712 (S.D. Cal. Aug. 11, 2008).

[12] *Concepcion*, 131 S. Ct. at 1744.

procedures.[13] In their motion, plaintiffs cited the California Supreme Court's decision in *Discover Bank v. Superior Court*,[14] which stated that the practice of putting waivers in consumer contracts is unconscionable because these provisions "cheat large numbers of consumers out of individually small sums of money," thereby facilitating a larger scheme of defrauding consumers.[15]

Although the District Court spoke favorably about the arbitration clause at issue, it found *Discover Bank*'s unconscionability analysis persuasive and held for the plaintiffs.[16] The Ninth Circuit stated that AT&T had not shown that bilateral arbitration was an adequate substitute for the availability of class actions in violation of the California law, and thus held the arbitration agreement invalid under § 2 of the FAA.[17]

The Ninth Circuit agreed that the arbitration agreement was unconscionable under California law and affirmed the trial court.[18] Additionally, the court declared that the FAA did not preempt the *Discover Bank* rule.[19]

III. THE COURT'S HOLDING AND REASONING

The Court held in a 5-4 decision authored by Justice Scalia that the FAA preempts the *Discover Bank* rule because the doctrine did not fall under the FAA's "saving clause" in § 2 and stood as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[20]

---

[13] *Id.* at 1745. In the context of arbitration, "unconscionability" includes two aspects: "(1) procedural unconscionability, which refers to the circumstances surrounding the adoption of the arbitration provision; and (2) substantive unconscionability, which refers to the fairness of the arbitration provision itself." 4 AM. JUR. 2D *Alternative Dispute Resolution* § 51 (2011). The arbitration agreement in this case was being challenged for its alleged substantive unconscionability.

[14] Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005) [hereinafter *Discover Bank*].

[15] *Id.* at 162.

[16] *Laster*, 2008 U.S. Dist. LEXIS 103712 at *34.

[17] *Id.* at *14.

[18] Laster v. AT&T Mobility LLC, 584 F.3d 849, 855 (2009).

[19] *Id.* at 857.

[20] *Concepcion*, 131 S. Ct. at 1753 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

A. *The Saving Clause Does Not Preserve State-Law Rules That Interfere with Fundamental Attributes of Arbitration*

The Concepcions argued that the FAA did not preempt the *Discover Bank* rule because the rule, which holds certain class-action waivers unconscionable, exists as one of the contract defenses preserved in the saving clause.[21] Section 2 provides:

> "A written provision ... to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as *exist at law or in equity for the revocation of any contract.*"[22]

The Court noted that § 2 must be interpreted to reflect a "liberal federal policy favoring arbitration,"[23] as well as a "fundamental principle that arbitration is a matter of contract."[24] Despite the section's overall support for arbitration, the final phrase of the statute grants courts the ability to invalidate arbitration clauses on grounds of fraud, duress, or unconscionability, i.e. generally applicable contract defenses.[25] Although this saving clause allows common contract defenses to be used in invalidating the contract as a whole, the defenses cannot "apply only to arbitration" and "derive their meaning from the fact that an agreement to arbitrate is at issue."[26]

The opinion made clear that the saving clause does not preserve state-law rules that interfere with fundamental attributes of arbitration.[27] The Court stated that despite the inclusion of ordinary contract defenses in the saving clause, state laws that mandate specific procedures in arbitration agreements, e.g. requiring the availability of class arbitration, are not consistent with the FAA.[28] The court goes on to give a few examples of other procedures that, if mandated by state law, would also violate the FAA. These include judicially

---

[21] *Concepcion*, 131 S. Ct. at 1746.

[22] 9 U.S.C. § 2 (2011) (emphasis added).

[23] *Concepcion*, 131 S. Ct. at 1745 (quoting Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

[24] *Concepcion*, 131 S. Ct. at 1745 (quoting Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010)).

[25] *Concepcion*, 131 S. Ct. at 1746.

[26] *See id.*

[27] *Id.* at 1746–49.

[28] *Id.* at 1747.

monitored discovery, strict adherence to the Federal Rules of Evidence, and necessitating a jury for final disposition of the case.[29] Because these procedures interfere with the fundamental attributes of arbitration, they do not "exist in law or equity" for the purposes of the saving clause.[30]

B. *The FAA Preempts California's* Discover Bank *Rule Because it Forces Class Arbitration to be Included in Arbitration Agreements*

The Court held that the *Discover Bank* rule disrupts the principal purpose of the FAA, to enforce arbitration agreements according to their terms, and therefore cannot be used to invalidate the arbitration agreement between the Concepcions and AT&T.[31] The Court found three main inconsistencies between the California rule and the FAA: (1) the sacrifice of arbitration's advantage of informality, (2) the forced, non-agreed-upon procedural formalities of class arbitration, and (3) the greatly increased risks to AT&T.[32]

First, by requiring class-action arbitration, the *Discover Bank* rule eliminates the informality of arbitration, rendering the decisionmaking process "slower, more costly, and more likely to generate procedural morass than final judgment."[33] In its opinion, the Court gave numerous statistics showing the benefits of bilateral arbitration over class arbitration, mostly due to the increased amount of pretrial work and time required for class arbitration.[34] The Court stated that ultimately, parties choose arbitration over going to court because of its speed and efficiency, and both attributes are lost if the state forces class-arbitration on the parties.

Second, class arbitration requires procedural formalities that must be agreed to by contract and that state law cannot impose on the parties.[35] Although the American Arbitration Association (AAA) has established rules

---

[29] *Id.* at 1747–48.

[30] *Id.* at 1748.

[31] *Concepcion*, 131 S. Ct. at 1750.

[32] *Id.* at 1751–52.

[33] *Id.* at 1751.

[34] *Id.* The Court makes a point to include the following quote from Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010), which held that an agreement that is silent on the availability of class arbitration cannot be used to compel those parties to such arbitration: "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen*, 130 S. Ct. at 1776.

[35] *Concepcion*, 131 S. Ct. at 1751.

governing class arbitration, the rules almost exactly mirror those of the Federal Rules of Civil Procedure. The rules governing class actions are cumbersome, impose significant burdens on the arbitrator and, according to the court, require specific agreement before they are adopted into an arbitration clause.[36] Parties have the choice to include these rules in the agreement at the drafting stage, but the Court held that it would be unjust to the joined parties if the arbitrator is alerted of the procedures at the last minute.[37] Thus, Justice Scalia reasoned that due to the complexity of class-wide procedures, it is "unlikely" that Congress intentionally left the "disposition of these procedural requirements to an arbitrator."[38]

Finally, by forcing AT&T to submit to class arbitration, the Court held that the company was being compelled to take on unforeseen risk.[39] Since damages from multiple claimants would be aggregated and decided in one fell swoop, the risk of an error would often become unacceptable.[40] Furthermore, due to the limited judicial review of arbitration awards, "arbitration is poorly suited to the higher stakes of class litigation."[41] Therefore, allowing a state court to compel class arbitration in agreements without explicit consent of the parties violates the FAA and is beyond Congress's intent.

Because the California rule "stands as an obstacle to the accomplishment of the FAA's objectives and execution of the full purposes and objectives of Congress," the FAA preempts it.[42]

IV. CONCLUSION AND IMPACT OF THE COURT'S RULING

The Court's holding in *Concepcion* will significantly affect the drafting of arbitration agreements in consumer contracts and arbitration jurisprudence

---

[36] *See id.* at 1751–52.

[37] *Id.*

[38] *Id.* at 1751–52.

[39] *Id.* at 1752. The Court notes that other courts have noted the risk that settlements in large-scale class actions entail. *See, e.g.*, Kohen v. Pac. Inv. Mgmt. Co. LLC & PIMCO Funds, 571 F.3d 672 (7th Cir. 2009) (noting the inherent risks associated with grouping numerous different claimants and damage amounts).

[40] *Concepcion*, 131 S. Ct. at 1752.

[41] *Id. See also* Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576, 578 (2008).

[42] *Concepcion*, 131 S. Ct. at 1753. *See also* Geier v. American Honda Motor Co., 529 U.S. 861, 872 (2000); Crosby v. National Foreign Trade Council, 530 U.S. 363, 372–373 (2000); *Hines*, 312 U.S. 52, 67 (1941).

in three ways. First, state laws that require specific provisions to be available to consumers in arbitration agreements, such as the availability of a class action arbitration proceeding, can be challenged on FAA preemption grounds. In the opinion, Justice Scalia analogizes California's now defunct class-action availability requirement to hypothetical state laws that require any of the following provisions to be incorporated in arbitration agreements: (1) judicially monitored discovery; (2) subject to the Federal Rules of Evidence; and (3) "disallow an ultimate disposition by a jury."[43] Although this was a specific list, Justice Scalia was quick to point out that "[o]ther examples are easy to imagine."[44] With no limitations on this list of examples, challenges to other state laws might be waiting in the wings. Hence, although the California law was the first victim of *Concepcion*, it certainly is not the last.

Second, the saving clause has lost some of its bite now that state law restrictions were found to not "exist at law or in equity for the revocation of any contract." Although the specific language of the FAA protects traditional contract defenses like unconscionability, *Concepcion* defeats broad state laws that ban certain provisions of arbitration contracts even when the restrictions are rooted in one of the named defenses. In other words, a consumer can still challenge an arbitration agreement on the grounds of duress, yet a state law that bans arbitration agreements that take advantage of a broad group of citizens that are susceptible to duress (e.g., senior citizens) is invalid. Thus, the saving clause still exists as a protection for the individual consumer, but state legislatures are restricted from expanding its protections to a large number of people via state law.

Finally, drafters of arbitration agreements will be proactive in restricting class-wide procedures in future arbitration agreements knowing that, once signed, no state law could invalidate the agreement. Practically speaking, the Concepcions would not have brought this suit individually; the fees would be too high compared to the potential amount of damages received. The state law gave the plaintiffs, and the other members of the class that felt defrauded, a claim that enabled their return to the courtroom and out of arbitration.

The Supreme Court has slammed the door to federal court in this decision. Knowing that state laws cannot come to consumers' aid, drafters of arbitration agreements on the sellers' side can take steps to further restrict the consumers' powers in arbitration. Indeed, if such agreements can only be

---

[43] *Concepcion*, 131 S. Ct. at 1747.

[44] *Id.*

challenged in an individual capacity, it will be beneficial to these companies to slip as many restrictions as possible on consumers when no one is looking. Thus, by making state law a nonfactor in arbitration agreement analysis, drafters may begin to challenge the boundaries of fair arbitration agreements to the detriment of American consumers.

Joseph C. Barsalona II